Supreme Court, U.S.
FILED
NOV 16 1992
OFFICE OF THE CLERK

Nos. 91-790 and 91-1206

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

CSX TRANSPORTATION, INC.,
Petitioner,
v.
LIZZIE BEATRICE EASTERWOOD,
Respondent.

LIZZIE BEATRICE EASTERWOOD,
Cross-Petitioner,
v.
CSX TRANSPORTATION, INC.,
Cross-Respondent.

On Writs of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

REPLY BRIEF FOR PETITIONER IN NO. 91-790 AND CROSS-RESPONDENT IN NO. 91-1206

JACK H. SENTERFITT *
RICHARD T. FULTON
JAMES W. HAGAN
ALSTON & BIRD
1201 West Peachtree
Atlanta, Georgia 30309-3424
(404) 881-7000

HOWARD J. TRIENENS
CARTER G. PHILLIPS
MARK E. HADDAD
LAURA V. FARTHING
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000

Counsel for Petitioner in No. 91-790
Counsel for Cross-Respondent in No. 91-1206

* Counsel of Record

November 16, 1992

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

I. RESPONDENT AND HER *AMICI* OVERSTATE CSXT'S CLAIM OF PRE-EMPTION AND IGNORE THE SECRETARY'S ALLOCATION OF RESPONSIBILITY FOR GRADE CROSSING SAFETY 1

II. RESPONDENT AND HER *AMICI* UNDERSTATE THE PRE-EMPTIVE SCOPE OF SECTION 434 6

A. The Purpose of Section 434 Was To Pre-empt, Not Preserve, State Law 6

B. The Presumption Against Pre-emption Is Inapplicable To Section 434 8

C. The Secretary's Intent Is Irrelevant And The Solicitor General's Views Are Entitled To No Deference 9

III. UNDER SECTION 434, THE SECRETARY'S REGULATIONS PRE-EMPT RESPONDENT'S GRADE CROSSING CLAIM 10

A. The Secretary's Regulations At 23 C.F.R. Parts 924 And 1204.4 Cover The Subject Matter Of Determining When Public Grade Crossings Need Additional Traffic Control Devices And Designing And Implementing Plans To Install Those Devices 11

B. The Secretary's Traffic Control Standards Set Forth In The MUTCD Also Cover The Subject Matter 15

C. Respondent's Claim Also Is Pre-empted By The Secretary's Regulations In Part 646 17

D. Respondent's Claim Is Pre-empted Under *Marshall* 21

TABLE OF CONTENTS—Continued

Page

IV. RESPONDENT'S TRAIN SPEED CLAIM IS ALSO PRE-EMPTED 23

V. SECTION 434'S EXCEPTION FOR ESSENTIALLY LOCAL SAFETY HAZARDS DOES NOT APPLY TO THE CLAIMS IN THIS CASE 24

CONCLUSION 25

TABLE OF AUTHORITIES.

CASES

Page

Aloha Airlines, Inc. v. *Director of Taxation*, 464 U.S. 7 (1983) 8

Armijo v. *Atchison, T. & S.F. Ry.*, 754 F. Supp. 1526 (D.N.M. 1990), *appeal docketed*, Nos. 91-2084, 91-2088 (10th Cir. 1991) 4, 24

Bowen v. *Georgetown Univ. Hosp.*, 488 U.S. 204 (1988) 10

Cipollone v. *Liggett Group, Inc.*, 112 S. Ct. 2608 (1992) 4, 8

Crane v. *Cedar Rapids & Iowa City Ry.*, 395 U.S. 164 (1969) 3

Exxon Corp. v. *Hunt*, 475 U.S. 355 (1986) 8, 10

FMC Corp. v. *Holliday*, 111 S. Ct. 403 (1990) 9

Fidelity Fed. Sav. & Loan Ass'n v. *De La Cuesta*, 458 U.S. 141 (1982) 9

Georgia R.R. & Banking Co. v. *Cook*, 95 S.E.2d 703 (1956) 3

Hatfield v. *Burlington N. R.R.*, 958 F.2d 320 (10th Cir. 1992), *petition for cert. filed*, 61 U.S.L.W. 3016 (U.S. June 8, 1992) (No. 91-1977) 16

Hillsborough County v. *Automated Medical Lab., Inc.*, 471 U.S. 707 (1985) 9

Investment Co. Inst. v. *Camp*, 401 U.S. 617 (1971) 10

Marshall v. *Burlington N., Inc.*, 720 F.2d 1149 (9th Cir. 1983) 11, 16, 21, 22

Morales v. *Trans World Airlines, Inc.*, 112 S. Ct. 2031 (1992) 9

New York v. *United States*, 112 S. Ct. 2408 (1992) 17

Park 'N Fly, Inc. v. *Dollar Park & Fly, Inc.*, 469 U.S. 189 (1985) 9

Perez v. *Campbell*, 402 U.S. 637 (1971) 23

Rice v. *Santa Fe Elevator Corp.*, 331 U.S. 218 (1947) 8

South Dakota v. *Dole*, 483 U.S. 203 (1987) 17

STATUTES AND REGULATIONS

Federal-Aid Highway Act of 1944, ch. 626, 58 Stat. 838 (codified as amended at sections of 23 U.S.C.)

TABLE OF AUTHORITIES—Continued

	Page
23 U.S.C. § 130	17
§ 130(d)	5, 11, 25
§ 409	4, 20
Federal Railroad Safety Act, Pub. L. No. 91-548, 84 Stat. 971 (1970) (codified as amended at 45 U.S.C. § 421 *et seq.*)	
45 U.S.C. § 431(a)	7
§ 433	7
§ 434	*passim*
Ga. Code Ann. § 51-1-2 (1991)	25
Ga. Code Ann. § 46-8-190 (1992)	3, 25
23 C.F.R. § 646.214 (1991)	13
§ 646.214(b)	18
§ 646.214(b)(2)	18, 20
§ 646.214(b)(3)(i)	18
§ 655.601(a)	15
Part 924	11, 18
§ 924.9	2, 11
§ 924.9(a)(4)	12, 18
§ 924.9(a)(4)(iii)	25
§ 924.9(a)(4)(v)	13, 25
§ 924.11	11, 12
Part 1204.4	11, 18
§ 1204.4 No. 12	11
§ 1204.4 No. 13	11
49 C.F.R. § 213.9 (1991)	3
§ 213.37	3
Part 234	3, 14
§ 236.501-236.505	3
44 Fed. Reg. 11544 (1979)	14
LEGISLATIVE MATERIALS	
116 Cong. Rec. 27611 (1970)	7
116 Cong. Rec. 27612 (1970)	7, 24
116 Cong. Rec. 27613 (1970)	7
Amtrak Safety, Hearing Before the Subcomm. on Surface Transportation of the Senate Comm. on Commerce, Science and Transportation, 98th Cong., 2d Sess. (1984)	5

TABLE OF AUTHORITIES—Continued

	Page
H.R. Rep. No. 1194, 91st Cong., 2d Sess., *reprinted in* 1970 U.S.C.C.A.N. 4104	24, 25
Hearings Before the Subcomm. on Transportation and Aeronautics of the Comm. on Interstate and Foreign Commerce on H.R. 7068, H.R. 11417, H.R. 14478 and S. 1993, 91st Cong., 2d Sess. (1970)	7, 24
Hearings on H.R. 16980 Before the House Comm. on Interstate and Foreign Commerce, 90th Cong., 2d Sess. (1968)	7
S. Rep. No. 619, 91st Cong., 1st Sess. (1969)	7
OTHER AUTHORITIES	
Report of the Secretary of Transportation to the United States Congress, The 1992 Annual Report on Highway Safety Improvement Programs (April 1992) (No. FHWA-SA-92-013)	6
U.S. DOT, Manual on Uniform Traffic Control Devices (1988) (No. FHWA-SA-89-006)	*passim*
U.S. DOT, Railroad-Highway Grade Crossing Handbook (2d ed. 1986) (No. FHWA-TS-86-215)	14
U.S. DOT, Rail-Highway Crossings Study (1989) (No. FHWA-SA-89-001)	5, 12, 14, 19
U.S. DOT, Traffic Control Devices Handbook (1983)	*passim*

REPLY BRIEF FOR PETITIONER IN NO. 91-790 AND CROSS-RESPONDENT IN NO. 91-1206

Respondent's and *amici*'s arguments against pre-emption mischaracterize the nature of the pre-emption claim advanced by CSX Transportation, Inc. ("CSXT") and misconstrue Section 434 of the Federal Rail Safety Act ("FRSA" or the "Act"). Railroads are and will continue to be liable in tort for negligent failure to meet their federally imposed duties and their state law duties not otherwise covered by federal regulation. But railroads may not be held liable in tort for failing to carry out the two duties at issue here. The Secretary's regulations cover these subjects by assigning exclusive responsibility to public authorities for selection of appropriate grade crossing devices and for determination of safe train speeds.

I. RESPONDENT AND HER *AMICI* OVERSTATE CSXT'S CLAIM OF PRE-EMPTION AND IGNORE THE SECRETARY'S ALLOCATION OF RESPONSIBILITY FOR GRADE CROSSING SAFETY.

In its opening brief, CSXT argued that two very specific prior tort duties of railroads, *viz.*, to determine what traffic control signals are needed at grade crossings and what train speeds are safe, have been pre-empted, pursuant to Section 434, by federal regulations that cover those very subject matters. At the same time, CSXT affirmatively stated that Section 434 did not pre-empt other railroad tort liability for negligence in carrying out its safety responsibilities at grade crossings. CSXT Br. 21-22, 21 n.9, 26 n.12. However this Court rules on the two specific duties at issue, this case will go back to the district court for trial on other admittedly non-pre-empted tort claims of respondent. Pet. App. 13a-18a.

Respondent and her *amici* assert, however, that what CSXT is seeking is pre-emption of *all* state tort law

remedies for railroad negligence at grade crossings.[1] Most of respondent's and *amici*'s responses turn, not only rhetorically but substantively, on this mischaracterization of CSXT's argument. Thus, respondent argues that "Congress never intended . . . to pre-empt the entire field of railroad safety." Resp. Br. 29. Respondent and the Solicitor General also cite excerpts of reports of the Secretary of Transportation which assume ongoing railroad tort liability. *Id.* at 14-17; S.G. Br. 21. Respondent and *amici* point out that the Secretary's "net benefit" calculus assumes that railroads continue to be liable in tort. *E.g.*, Resp. Br. at 14-17.

Respondent and *amici* attack a straw man. CSXT has never argued that Section 434 pre-empts all railroad tort liability at rail-highway crossings. Railroads remain liable for negligence in carrying out the responsibilities for grade crossing safety that the Secretary has assigned to them. Railroads are not liable, however, for responsibilities that the Department of Transportation has taken upon itself to regulate (determining what train speed is safe) or has assigned exclusively to the states (determining the need for and selection of traffic control devices).

Pre-empting these duties does not eliminate tort liability for negligence at grade crossings. Railroads remain responsible in tort for injuries caused by their negligent failure to meet their federal safety responsibilities as well as their remaining non-pre-empted state law responsibilities. Under federal law, railroads have a duty, *inter alia*, to participate in the federally mandated state process for evaluating and selecting traffic control devices (23 C.F.R. Part 924 (1991); Manual on Uniform Traffic Control Devices (1988) ("MUTCD") Part VIII), to keep

[1] *See, e.g.*, Resp. Br. 8 (CSXT interprets Section 434 as "absolving the railroad of liability in tort"); *id.* at 30 (the "argument propounded by petitioner" is that Section 434 "pre-empts the entire field"); S.G. Br. 24 (nothing in federal regulations "provides a basis for concluding that railroads are relieved from their duty of care in all circumstances"). *See also* Railway Labor Executives Br. 4; American Trial Lawyers Association ("ATLA") Br. 2, 9, 10, 11, 21.

such devices in proper working order (49 C.F.R. Part 234 (1991)), to trim vegetation along their tracks to ensure proper visibility (*id.* at § 213.37), and to travel within federally imposed speed limits (*id.* at §§ 213.9, 236.501-.505).[2] Under state law, railroads have a duty, *inter alia*, to have the engineer blow the train's whistle before entering a crossing, maintain a constant and vigilant lookout along the track, and attempt to stop or slow the train if possible to avoid a collision. *E.g.*, Ga. Code Ann. § 46-8-190 (1992); *Georgia R.R. & Banking Co.* v. *Cook*, 95 S.E.2d 703 (1956). If a railroad negligently fails to meet these state or federal safety responsibilities and thereby causes injury, no federal law pre-empts the injured party from seeking compensation from the railroad under state tort law. Here, for example, respondent complains that CSXT allowed vegetation along the tracks to impair visibility at the crossing and that the flashing lights at the crossing malfunctioned. Resp. Br. 2. Such claims are not pre-empted by Section 434, and at least the vegetation claim is available for trial regardless of this Court's decision.[3]

Similarly, states also can be liable for their failure to meet the responsibilities that the Secretary has assigned to them, particularly, "determination of need [for] and selection of devices at a grade crossing." MUTCD 8A-1. The Secretary has acknowledged that tort liability is a real concern for the states, because sovereign immunity "survives in less than a third of the States."[4]

[2] Railroads are liable for damages under state tort law for injuries caused by the violation of federal regulations. *Crane* v. *Cedar Rapids & Iowa City Ry.*, 395 U.S. 164, 166 (1969) (where federal statute provides no cause of action for "damages from injuries resulting from a railroad's violation of the Act," the injured party may bring "a common-law action in tort" for those damages).

[3] The complaint does not allege that the flashing lights malfunctioned. *See* J.A. 4-5 ¶ 8. Neither the court of appeals nor the district court identified malfunctioning lights as one of respondent's claims. *See* Pet. App. 17a-18a, 24a.

[4] *See, e.g.*, U.S. DOT, Traffic Control Devices Handbook 1-15 (1983) ("MUTCD Handbook"); *see also id.* at 1-20 (citing 1980

Unlike *Cipollone* v. *Liggett Group, Inc.*, 112 S. Ct. 2608 (1992), where the plurality decided which tort claims had been pre-empted and which had not, here the Secretary's assignment of responsibilities means that the Secretary effectively has decided which tort claims have been pre-empted and which have not. And unlike the situation in *Cipollone* where pre-emption of the manufacturer's tort liability meant that plaintiffs had no recourse in damages, here the Secretary's assignment of the responsibilities for grade crossing protection does not preclude tort actions against the responsible public authorities.[5]

CSXT's position is thus consistent with statements of the Secretary that public and private actors, including railroads, share "joint responsibility" for railroad safety. MUTCD 8A-1; See Resp. Br. 6, 14-16; S.G. Br. 17, 21. This case simply does not present the Court with a choice between pre-empting all or no railroad tort liability. Congress did not eliminate all tort liability, the Secretary's regulations have not eliminated it, and CSXT does not seek such relief. CSXT seeks only to have the plain

---

survey estimating "8,000 pending tort claims totaling over $3 billion" against state highway agencies); *Armijo* v. *Atchison, T. & S.F. Ry.*, 754 F. Supp. 1526, 1533 (D.N.M. 1990) (pre-emption of claim against railroad that crossing required additional signals would not deny plaintiff "access to the courts or a right of recovery" because State "would probably not enjoy sovereign immunity" against such a claim), *appeal docketed*, Nos. 91-2084, 91-2088 (10th Cir. 1991).

In further recognition of state liability, the Secretary proposed legislation, enacted and codified at 23 U.S.C. § 409, forbidding use of state highway department documents in any action for damages. *See* Br. for U.S. in *Alabama Highway Dep't* v. *Boone*, No. 90-1412 at 9-10 (1991). These documents were protected because of the concern that allowing their discovery would deter states from "compil[ing] complete and accurate information" about grade crossing hazards and thereby "jeopardize the effectiveness of federal programs intended to promote highway safety . . . ." *Id.* at 12, 15.

[5] To the extent recourse against the states is limited by sovereign immunity, that is a function of the *states'* refusal to be responsible for damages, and is not attributable to Section 434.

meaning of Section 434 applied precisely the way Congress intended it to apply: to pre-empt the imposition upon railroads, through state tort law, of duties that the Secretary has placed on other parties.

The straightforward application of Section 434 leads to improved safety at grade crossings.[6] Railroads continue to be liable for failing to meet the substantial responsibilities that federal and state law impose, including participating responsibly in the joint public/private Rail-Highway Crossing Program (23 U.S.C. § 130(d)) and maintaining active control devices and other physical aspects of a crossing in good condition. Railroads also have an enormous economic incentive, quite apart from this threat of tort liability, to avoid crossing accidents by investing in crossing safety.[7]

---

[6] Respondent and *amici* wrongly assert that railroad negligence and a lack of active warning devices are responsible for the roughly 550 fatal accidents that still occur annually at grade crossings. *E.g.*, American Bus Ass'n et al. Br. 7. The Secretary has found that "more than half of all rail-highway crossing accidents are the result of a motorist driving around lowered gates or proceeding through flashing red lights without stopping" (U.S. DOT, Rail-Highway Crossings Study 4-20 (1989) ("DOT Study")), and that "[n]early all grade crossing accidents involve some degree of driver error." MUTCD Handbook 8-79. The Secretary also has rejected the idea that active devices are needed at every crossing: "Today, however, most of the high-risk crossings have been improved, and many of the crossing accidents are occurring at low volume crossings where the installation of flashing light signals and gates usually cannot be justified." DOT Study at 4-15.

[7] *See, e.g.*, Amtrak Safety, Hearing Before the Subcomm. on Surface Transportation of the Senate Comm. on Commerce, Science, and Transportation, 98th Cong., 2d Sess. 56-57 (1984) (testimony of W. G. Claytor) ("The motivation not to have a derailment on your railroad, in addition to being very dangerous, is that it is very expensive for you. Even if you don't pay all the passenger costs, you disrupt the road, you have a lot of expenses, your traffic is wrecked, and everything else. So the motivation not to have a train wreck, if you are running a decent railroad, is pretty great whether or not the expenses of a particular thing are higher or lower").

What the recognition of pre-emption does is to allow the federally mandated grade crossing program to work efficiently. Without pre-emption, railroads would shift their resources to crossings that on any objective measure are not hazardous but that present a higher risk of tort liability, particularly for punitive damages, such as crossings where an accident recently occurred. By reinforcing the rational, forward-looking, priority-based scheme of crossing evaluation and improvement that Congress mandated, pre-emption of duplicative responsibilities contributes to the rail progress that FRSA has made in improving grade crossing safety.[8]

II. RESPONDENT AND HER *AMICI* UNDERSTATE THE PRE-EMPTIVE SCOPE OF SECTION 434.

A. The Purpose Of Section 434 Was To Pre-empt, Not Preserve, State Law.

Respondent and her *amici* not only overstate the scope of CSXT's position on pre-emption, they understate the pre-emptive effect of Section 434. Respondent argues that "Congress intended [Section 434] to broadly preserve the authority of the states" to regulate rail safety. Resp. Br. 3; see State & Local Legal Center Br. at 8-9 & n.3 (Congress intended Section 434 to be "an affirmation of state authority").

This interpretation of Section 434 cannot be reconciled with the express language, structure and history of FRSA. The whole point of the Act was to provide the newly created Department of Transportation with comprehensive regulatory authority to prescribe uniform and exclusive federal regulation for rail safety. This is plain on the face

[8] *See* CSXT Br. 12 (88 percent decrease in fatalities since 1974); *accord*, Br. for U.S. in *Alabama Highway Dep't* v. *Boone*, No. 90-1412 at 2 (1991). In 1990, the most recent year for which statistics are available, there were 568 fatalities at highway/grade crossings, a decline of "16.7 percent" from the previous year, and notable in light of "a 1.9 percent increase in miles traveled." Report of the Secretary of Transportation to the United States Congress, The 1992 Annual Report on Highway Safety Improvement Programs, at S-1, S-2 (April 1992).

of the statute. Congress began the statute by authorizing the Secretary to issue rules and regulations "for all areas of railroad safety." 45 U.S.C. § 431(a). The first sentence of Section 434 states that Congress's intent is to make the laws "relating to railroad safety . . . nationally uniform to the extent practicable." *Id.* at § 434. Congress underscored the need for uniformity in grade crossing regulation by singling out grade crossings for "a comprehensive study" by the Secretary. *Id.* at § 433.[9]

Hammering out the scope of pre-emption was the turning point in the process of enacting FRSA.[10] The Secretary's original bill would have pre-empted all state law (except in specified areas) automatically after two years.[11] Concerned that it might be infeasible for the Secretary comprehensively to regulate all aspects of rail safety within two years, thereby creating "a lapse in regulation," the final bill modified the pre-emption provision to take effect as each new national regulation was adopted.[12] The only other instance in which state law remains in force is where necessary to address uniquely local situations not susceptible to nationwide standards. See *infra* Part V.

Congress believed that uniform federal regulation was essential to achieving rail safety—that is why Congress included an express pre-emption provision. The lives

[9] The legislative history makes clear that Congress intended to take charge of and achieve uniformity in all aspects of rail safety, not simply, as respondent argues (Resp. Br. 21), in enforcement. *See, e.g.*, S. Rep. No. 619, 91st Cong., 1st Sess. 5 (1969); 116 Cong. Rec. 27611 (1970) (statement of Rep. Staggers); *id.* at 27612 (statement of Rep. Springer); *id.* at 27613 (statement of Rep. Pickle).

[10] Hearings Before the Subcomm. on Transportation and Aeronautics of the Comm. on Interstate and Foreign Commerce on H.R. 7068, H.R. 11417, H.R. 14478, and S. 1993, 91st Cong., 2d Sess. 43, Ser. No. 91-51 (1970) (statement of Rep. Springer) ("1970 Hearings"); *id.* at 141 (statement of Rep. Kuykendall).

[11] *See* Hearings on H.R. 16980 Before the House Comm. on Interstate and Foreign Commerce, 90th Cong., 2d Sess. 1-6, Ser. No. 90-39 (1968) (H.R. 16980 Section 4).

[12] 1970 Hearings at 29 (testimony of Secretary Volpe).

saved and injuries avoided since 1974 show that Congress was right. Respondent's argument that this watershed national legislation was meant largely to affirm state regulatory authority is untenable.

B. The Presumption Against Pre-emption Is Inapplicable To Section 434.

Respondent and *amici*, including the Solicitor General, also argue that this Court should construe Section 434 in light of a presumption against pre-emption. They rely on *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218 (1947), and *Cipollone* v. *Liggett Group, Inc.*, 112 S. Ct. 2608 (1992).

Rice, however, was an implied pre-emption case. This Court already has rejected the counterintuitive argument that courts should follow *Rice* and presume that Congress does not intend to pre-empt state law where Congress has expressly provided in the statute for pre-emption of state law. In *Aloha Airlines, Inc.* v. *Director of Taxation*, 464 U.S. 7 (1983), a unanimous Court reversed a state supreme court decision that looked "beyond the plain language of the federal statute" to the principles in *Rice* to hold that state law was not pre-empted. *Id.* at 12. Noting that "*Rice* and its progeny . . . involved the implicit pre-emption of state statutes," the Court held that "[r]ules developed in these cases . . . have little application when a court confronts a federal statute . . . that explicitly pre-empts state laws." *Id.* at n.5. See also *Exxon Corp.* v. *Hunt*, 475 U.S. 355, 362 (1986).

Cipollone v. *Liggett Group, Inc.*, 112 S. Ct. 2608 (1992), on which respondent and the Solicitor General also rely, is not to the contrary. That case involved a pre-emption provision that Congress had drawn "narrowly" (*id.* at 2618), and that, as the separate opinion of Justice Blackmun stated, was framed "ambiguously." *Id.* at 2625-26. Given the statute's ambiguity and its narrow pre-emptive purpose, it was consistent with congressional intent for the Court "fairly but . . . narrowly" to construe the pre-emption provision. *Id.* at 2621. Nothing in *Cipollone* or

Rice purports to alter the basic principle that, in cases of express pre-emption, the question of how broadly or narrowly Congress meant to pre-empt state law is answered by the "ordinary meaning" of the statutory language. *FMC Corp.* v. *Holliday*, 111 S. Ct. 403, 407 (1990); see *Park 'N Fly, Inc.* v. *Dollar Park & Fly, Inc.*, 469 U.S. 189, 194 (1985); *Morales* v. *Trans World Airlines, Inc.*, 112 S. Ct. 2031, 2036 (1992).

C. The Secretary's Intent Is Irrelevant And The Solicitor General's Views Are Entitled To No Deference.

The Solicitor General offers two reasons why this Court should defer to his views in construing the scope of pre-emption under Section 434. First, he argues that because pre-emption under Section 434 is triggered by the issuance of federal regulations, the "pre-emptive scope [of Section 434] is . . . determined by the intent of the issuing authority." S.G. Br. 14. The cases on which he relies, however, involve statutes that differ in a crucial way from FRSA—they lack any express pre-emption provision. See *Hillsborough County* v. *Automated Medical Lab., Inc.*, 471 U.S. 707, 714 (1985); *Fidelity Fed. Sav. & Loan Ass'n* v. *De La Cuesta*, 458 U.S. 141, 144-45, 154 (1982). These cases stand only for the principle that agency intent is relevant where Congress has not spoken expressly to the question of pre-emption, and has merely given the agency general authority. *Id.* In contrast, in Section 434, Congress expressly identified the circumstances in which state law is pre-empted. Congress decided that pre-emption shall occur once a regulation is adopted that covers the subject matter of a state law. Under Section 434, it is not open to the Secretary to choose whether or not to pre-empt state law when issuing a regulation on a particular subject matter, and therefore the Secretary's intent is irrelevant.[13]

---

[13] Accordingly, the Solicitor General's conclusion that there is no pre-emption of claims like respondent's because it is improper to infer from the Secretary's "silence" an intent to pre-empt is untenable. *See* S.G. Br. 24 n.27, 26.

Second, the Solicitor General asserts that his brief is "entitled to deference" because it presents the "view of the responsible agency." S.G. Br. 22. But this Court has repeatedly "declined to give deference to an agency counsel's interpretation of a statute where the agency itself has articulated no position on the question . . . ." *Bowen* v. *Georgetown Univ. Hosp.*, 488 U.S. 204, 212 (1988); see *Investment Co. Inst.* v. *Camp*, 401 U.S. 617, 627-28 (1971) (same); *cf. Exxon Corp.*, 475 U.S. at 363-70 (rejecting "the Solicitor General's reading of the [statute's] pre-emptive scope" without suggesting any deference was due). In this case, the Solicitor General's argument was developed only in response to this Court's invitation to brief the case. In recommending that the Court grant this case, the Solicitor General, after consultation with and review by the Department of Transportation, was unable to state on the merits whether either of respondent's claims was pre-empted. See Br. for U.S. on Petitions For Writs Of Certiorari at 15. Neither the Solicitor General nor respondent nor any *amicus* has pointed to a single sentence anywhere in the Secretary's regulations or reports expressly stating an intent to pre-empt or not to pre-empt the railroad's duties to select traffic control signals at grade crossings or to travel at safe speeds. Accordingly, the Solicitor General's views are not entitled to deference.

III. UNDER SECTION 434, THE SECRETARY'S REGULATIONS PRE-EMPT RESPONDENT'S GRADE CROSSING CLAIM.

To determine pre-emption under Section 434, only two questions need to be answered: (1) what is the subject matter of the state requirement, and (2) do the Secretary's standards and regulations cover that subject matter? Respondent defined the subject matter as identifying hazardous grade crossings, proposing appropriate traffic control devices, and installing and paying for such devices where appropriate. The Solicitor General's definition focuses on the railroad's duty to participate in the Rail-Highway Crossings Program. Under either definition,

the Secretary, both in 23 C.F.R. Parts 924 and 1204.4 and in the MUTCD, has promulgated regulations and standards that cover this subject matter. Respondent's grade crossing claim is pre-empted also under either the Solicitor General's limited "federal funding" theory or the Ninth Circuit's decision in *Marshall* v. *Burlington Northern, Inc.*, 720 F.2d 1149 (9th Cir. 1983).

A. The Secretary's Regulations At 23 C.F.R. Parts 924 And 1204.4 Cover The Subject Matter Of Determining When Public Grade Crossings Need Additional Traffic Control Devices And Designing And Implementing Plans To Install Those Devices.

Respondent initially describes the railroads' duty as "determining that improved grade crossing devices are needed, seeking approval from the state and implementing the devices with their own funds should the request be approved but federal funds not be made available." Resp. Br. 6. Respondent later refers, more simply, to the railroad's duty "to install gate arms at hazardous crossings." *Id.* at 50. The two reduce to the same duty, because the railroad cannot carry out a state tort law duty to install gate arms at hazardous crossings without first surveying all of the crossings its trains pass through and then designing, proposing, and implementing projects to install new traffic control devices.

The Secretary's regulations in 23 C.F.R. Parts 924 and 1204.4 cover this subject matter. These regulations implement the federally mandated Highway Safety Improvement Program and Rail-Highway Crossing Program, which make each state responsible for evaluating *every* grade crossing for potential hazards, ranking each crossing in terms of risk, and implementing appropriate improvement projects. See 23 C.F.R. §§ 924.9, 924.11, 1204.4 Nos. 12.I.G and 13.D.5; CSXT Br. 28-30. Indeed, these regulations—and the legislation that prompted them—track virtually word-for-word the state tort law duty that respondent describes. Compare Resp. Br. 6 (quoted above) with 23 U.S.C. § 130(d) ("Each state"

must "identify those railroad crossings which may require . . . protective devices . . . and implement a schedule of projects for this purpose") and 23 C.F.R. §§ 924.9 (a)(4), 924.11 (to comply with 130(d), states must perform an "[o]nsite inspection of public grade crossings," rank the "relative hazard" of those grade crossings "based on a hazard index formula" and on potential danger due to "passenger trains, school buses, transit buses, pedestrians, bicyclists, or by trains and/or motor vehicles carrying hazardous materials," and must "schedul[e] and implemen[t] [those] safety improvement projects").[14]

These regulations pre-empt the railroads' state tort law duty independently to assess the need for additional traffic control devices. They replace that former independent state tort law duty with a new federally imposed duty to participate in each state's federally mandated Highway Safety Improvement Program. Railroads provide a "signal engineer" to serve as one member of a "diagnostic team" that also includes "a highway traffic engineer" and other public officials as appropriate, and that performs "an engineering and traffic investigation" to determine "which type of traffic control system is required at a crossing." DOT Study at 4-9; see MUTCD Handbook 8-1 (1983) ("the highway engineer and the railroad engineer will share responsibilities at the grade crossing . . . both must be involved in the decisionmaking process").[15] The state must be involved in each crossing

[14] Only *amicus* ATLA argues (Br. 12-14) that these regulations do not trigger pre-emption because the Secretary did not promulgate them pursuant to the FRSA. *Amicus* ignores the dispositive point, however, that under the plain language of Sections 433 and 434 any regulation related to rail safety issued by the Secretary pre-empts state law. *See* CSXT Br. 37; S.G. Br. 19 n.17.

[15] The Solicitor General edits parts of this passage in his brief to suggest that the shared responsibility is to "select appropriate traffic control devices." S.G. Br. 21. The Handbook does not say that, nor could it; the Manual makes clear that the railroad's role is to provide engineering support for the evaluation, but that the

evaluation for two reasons. First, as respondent and the Solicitor General concede (Resp. Br. 28; S.G. Br. 20 n.18), the state has exclusive authority to determine whether traffic control devices may be installed on public roadways. Second, the Secretary has mandated that the state take into consideration factors, such as future demographic changes and ancillary effects on highway safety, that state and local governments are uniquely suited to know of and consider. 23 C.F.R. § 924.9(a)(4)(v). In short, the Secretary has determined that railroads may not and ought not make unilateral decisions to install traffic control devices.

Respondent and the Solicitor General have no persuasive answer to this point. They first suggest that the existence of this federally mandated scheme does not displace the analogous state tort law duty because there is no inevitable conflict in having two parallel evaluation processes. They argue that the railroad, in addition to participating in the federal scheme, should make its own unilateral judgments about which crossings need additional traffic control devices, and "if the state or local agency refuse[s] the railroad's request, the railroad would have an excellent defense to a negligence claim." Resp. Br. 6; see S.G. Br. 20-21 n.19. This argument fails because pre-emption under Section 434 does not depend on proof of a conflict between state and federal regulation. Under Section 434, pre-emption turns on a showing that the subject matter of the state law has been covered by the Secretary.

Respondent also argues that the Secretary's regulations "only appl[y] to crossings updated with federal funds and merely provide[] guidelines for prioritization of crossings eligible to receive those funds." Resp. Br. 5, 25. This is incorrect. While it is true that the regulations at 23 C.F.R. § 646.214 apply only to federally funded proj-

decision about whether or not to install a particular device is exclusively the public authority's decision to make. *See* MUTCD 1A-3, 8A-1, 8D-1.

ects, the Highway Safety Improvement Program set forth in Part 924 applies to every public grade crossing in the state. Many of these projects are implemented without federal funds (see DOT Study at 3-7, 3-8), an approach that the Secretary contemplated in the notice setting forth the Final Rule. See 44 Fed. Reg. 11544 (1979) ("The logical conduct of a highway safety improvement program should be virtually independent of the nature of the program's funding").

The Solicitor General argues that Part 924 "does not explicitly or implicitly suggest that a railroad has *no* responsibility to identify hazardous crossings and to provide necessary improvements when federal funds have not been allocated for that purpose." S.G. Br. 26. That is not the point. Railroads do have continuing obligations to identify certain hazards, *e.g.*, those related to operation and maintenance of traffic control devices, as well as to contribute information and resources to the states' crossing review efforts. *E.g.*, 49 C.F.R. Part 234; see also U.S. DOT, Railroad-Highway Grade Crossing Handbook 52-54 (2d ed. 1986). But because Congress and the Secretary have created a process for identifying hazardous crossings in which the states have exclusive responsibility for determining whether particular crossings need additional protective devices, the imposition under state law of a duplicative duty upon CSXT is pre-empted.

The Solicitor General confuses the issue by arguing that the "basic issue . . . in this case" is whether railroads continue to have a tort law duty "to participate in the process of providing safe grade crossings." S.G. Br. 18; see also *id.* at 11, 19, 24 n.26. The "process" to which the Solicitor General refers is not the historic state law duty of railroads independently to provide safe grade crossings. Rather, it is a new duty to participate in the federally mandated Rail-Highway Crossings Program:

> The Rail-Highway Crossings Program *requires the States to implement a program to survey grade crossings and implement improvement projects*, and prescribes factors to be considered in that process. See 23 U.S.C. § 130; 23 C.F.R. Pts. 646, 655, 924. We see no reason to infer from that scheme that a state law "requirement" that railroads *participate in that process* was displaced by silence.

S.G. Br. 24 n.27 (emphasis added).

CSXT has never argued, however, that a state law duty to participate in the process created by the federal Rail-Highway Crossings Program was pre-empted. The "process" under that Program requires that the railroads respond to a State's requests for information or assistance to enable *the State* to determine the appropriate traffic control devices for each crossing, install the traffic control devices that the State has determined are necessary, and maintain those devices in working order.

Respondent has not claimed that CSXT has breached its duty to participate in this process. Respondent's claim is that CSXT had an independent duty, regardless of what the state did, to see to it that appropriate traffic control devices are in place at all crossings. This claim is viable only if CSXT has an independent duty to make its own individual determination whether grade crossings need additional traffic control devices. Because the Secretary's regulations cover the subject matter of making such determinations, respondent's claim is pre-empted by Section 434.

B. The Secretary's Traffic Control Standards Set Forth In The MUTCD Also Cover The Subject Matter.

Respondent and *amici* do not dispute that the Manual on Uniform Traffic Control Devices (MUTCD) has been incorporated as a whole into federal regulations and therefore has pre-emptive force under Section 434. See 23 C.F.R. § 655.601(a). The Solicitor General argues, however, that "the crucial sentence" in the MUTCD, "which states that '[t]he determination of need and selection of devices at grade crossings is made by the public agency with jurisdictional authority'—merely describes the process that has long governed the selection of traffic

control devices." S.G. Br. 20 (quoting the MUTCD at 8A-1); see also MUTCD at 8D-1 ("The selection of traffic control devices at a grade crossing is determined by public agencies having jurisdictional responsibility at specific locations").

The Solicitor General's attempt to dismiss the language of the MUTCD fails for two reasons. First, as the Solicitor General acknowledges (Br. 20 n.18), the MUTCD elsewhere mandates that public authorities have exclusive responsibility for decisions regarding traffic control devices: "Traffic control devices *shall* be placed *only* by the authority of the public body or official having jurisdiction." MUTCD 1A-3.1 (emphasis added).

Second, the very passage on which the Solicitor General has focused speaks not simply of the final authority to approve devices but of the "determination of need" for the devices. MUTCD 8A-1. That determination—which is precisely what respondent claims that CSXT had an independent state law obligation to make—has therefore been assigned by the Secretary to the public authority. Each of the federal courts of appeals that has interpreted the MUTCD has so held. *Marshall* v. *Burlington N., Inc.*, 720 F.2d 1149, 1154 (9th Cir. 1983); *Hatfield* v. *Burlington N. R.R.*, 958 F.2d 320, 323 (10th Cir. 1992), *petition for cert. filed*, 61 U.S.L.W. 3016 (U.S. June 8, 1992) (No. 91-1977).

Third, even if the crucial language of the MUTCD were merely "descriptive" rather than prescriptive, it is descriptive of the post-FRSA statutory and regulatory scheme that created a uniform and effective process for evaluating and upgrading traffic control devices at grade crossings. As the MUTCD states and as CSXT acknowledges, the system is one where states and railroads have "joint responsibility" for crossing safety. MUTCD 8A-1; see *supra* pp. 2-6. But the concept of "joint responsibility" is not incompatible with assigned duties. Indeed, the preceding sentence in the MUTCD acknowledges that both the "highway agency and the railroad company"

have "assigned duties." MUTCD 8A-1. And the very next sentence in the MUTCD specifies that the "determination of need" is *not* jointly assigned, but rather is the responsibility of "the public agency with jurisdictional authority." *Id.*; see also *id.* at 8D-1 ("Before a new or modified grade crossing traffic control system is installed, approval is required from the appropriate agency within a given State"). Thus, Part VIII of the MUTCD, added after the passage of FRSA, at the very least confirms that the Secretary's regulations cover the subject matter of determining when additional traffic control devices are needed. The railroads' former state law duty to make that same judgment is therefore pre-empted.[16]

C. Respondent's Claim Also Is Pre-empted By The Secretary's Regulations In Part 646.

The Solicitor General argues that the Secretary's regulations do pre-empt state tort law duties, but only where the grade crossing at issue has been "improved with the use of federal funds," and only then where no showing of intervening "changed circumstances" or railroad negligence in the upgrade process is made. S.G. Br. 24 & n.26. This novel theory, which the government has not previously advanced and which no court has adopted, is incorrect; in any event, there would be pre-emption in this case even if the Court were to accept this theory.

1. The Solicitor General's theory that state tort law is pre-empted only at crossings upgraded with federal

---

[16] One *amicus* suggests that pre-emption based on MUTCD is unconstitutional under *New York* v. *United States*, 112 S. Ct. 2408 (1992), because the federal government "cannot force the states" to "regulate the selection of crossing signalization" via pre-emption rather than "through the use of incentives." ATLA Br. 17-18 n.5. Here, however, Congress has provided an incentive for states to adhere to MUTCD and the rest of the highway safety regulations—the availability of federal highway funds. *E.g.*, 23 U.S.C. § 130. Moreover, Congress's use of an express pre-emption provision in FRSA satisfies fully its obligation to give the states notice of the implications for state law of the acceptance of such funds. *See South Dakota* v. *Dole*, 483 U.S. 203, 207-08 (1987).

funds is based solely on a reading of one regulatory provision, 23 C.F.R. § 646.214(b). CSXT agrees with the Solicitor General that subsections 646.214(b)(2) and (3)(i) establish when traffic control devices will be deemed "adequate" at federally funded projects and therefore pre-empt claims like respondent's with respect to such crossings. CSXT Br. 34; S.G. Br. 23.

The Solicitor General argues, however, that pre-emption is limited to crossings upgraded with federal funds because "[n]o regulation of the Secretary addresses the duty of the railroad to improve the safety of a grade crossing when the State decides not to utilize limited federal funds for that purpose." S.G. Br. 27. This ignores 23 C.F.R. Parts 924 and 1204.4. As discussed above, these regulations require the states to survey and improve their crossings regardless of whether or not they choose to seek federal funds. When a state chooses to spend federal funds, the criteria identified in Section 646.214(b) for adequate warning devices are applicable. But where the state chooses not to use federal funds, the Secretary's regulations require the state to apply the criteria set forth in Section 924.9(a)(4) to determine whether improvements are needed, a process in which the standards set forth in 23 C.F.R. § 646.214(b) (for determining whether gates are needed at federally funded projects) should be considered. MUTCD Handbook at 8-31. The Secretary's regulations therefore cover what the Solicitor General agrees is the relevant subject matter—the duty to decide whether a particular public crossing needs additional control devices.

By relying upon Section 646.214(b) out of context, the Solicitor General has now proposed a rule having irrational consequences. Consider a state's decision to use federal funds to upgrade one crossing to the standard of another crossing, in the same town, that had previously been upgraded with state and private funds. In the Solicitor General's view, a plaintiff would have a viable tort claim against the railroad if injured at the crossing funded by the state, even though its level of protection is

identical to that which had been determined to be adequate in the recently completed, federally funded project.

Consider also a situation in which a local or state authority decides not to use available federal funds to add traffic control devices because of the danger and burden that those devices would present to existing highway traffic. Under the Solicitor General's view, a plaintiff would have a viable tort claim against the railroad even though the decision not to improve the crossing was entirely a public decision. That is this case. The City of Cartersville rejected the diagnostic team's initial recommendation that gates be installed at Cook Street because that would have required the construction of a traffic island that the City decided would pose a danger to highway traffic. J.A. 17, 32. The City's concern with traffic islands is understandable; Part V of the MUTCD is devoted exclusively to issues regarding use of traffic islands, and the Secretary has recognized the danger at crossings of accidents that do not involve trains. *E.g.*, DOT Study 2-12. Nothing in the record supports the Solicitor General's speculation (S.G. Br. 3, n.1) that a lack of funds influenced the City and the State's decisions; rather, once the public authorities rejected the Georgia Department of Transportation's (GDOT's) proposal, the federal funds previously earmarked for a gate at Cook Street were transferred to other projects. J.A. 15-17, 28-34.

Adopting the Solicitor General's approach also would require extensive and needless litigation. What, for example, is the proper definition of a federally funded project? The Solicitor General appears to assume that it includes only those crossings that are actually improved with federal funds, yet under the "corridor approach" endorsed by the Secretary (DOT Study at 4-15), states may analyze several crossings simultaneously and receive federal funding for a plan that includes upgrades only at some crossings. Similar difficulties would arise over the definition of elements such as what constitutes "changed circumstances."

Finally, Congress has interposed a significant obstacle to the very inquiry that the Solicitor General now says should be central to these cases. In 23 U.S.C. § 409, Congress has barred courts from admitting into evidence, "consider[ing] for any other purposes," or even allowing discovery of, the very records relating to funding that would be necessary to decide these cases under the Solicitor General's new proposal. As the Solicitor General elsewhere has recognized, Congress did so at the request of state highway departments concerned about the tort liability that their responsibility for making decisions about traffic control devices had created. See Br. for U.S. in *Alabama Highway Dep't* v. *Boone*, No. 90-1412, at 10 (1991).

2. Without any citation, the Solicitor General asserts that "[t]he grade crossing claim is not pre-empted because there is no evidence that the Cook Street crossing was improved using federal funds." S.G. Br. 26; see *id.* at 12 (same). The Solicitor General is wrong.

The affidavit of Wendall A. Hester, a traffic engineer with the GDOT, expressly states that the GDOT considered Cook Street together with four other crossings in Cartersville and that improvements at four of the crossings "were funded through our Federal and State Railroad Crossing Safety Program." J.A. 16 ¶ 5. This project involved a corridor approach in which the public authority simultaneously reviewed multiple crossings in close proximity. The Cook Street crossing was an integral part of this project and, pursuant to 23 C.F.R. § 646.214(b)(2), federal funds could not have been approved for this project unless the warning devices were deemed "adequate," which they were determined to be.

Hester's affidavit establishes also that the GDOT specifically approved the expenditure of project funds on an "upgrade of the motion detector at Cook Street." J.A. 17 ¶ 7. Hester's affidavit states that "the cost for this upgrade *was included* in the estimated costs proposal prepared by the Railroad for the West Avenue crossing improvements and authorized and approved by my sec-

tion." *Id.* (emphasis added). The MUTCD recognizes that motion detection circuitry is a basic component of an active warning device system. MUTCD 8C-5. Nothing in the record contradicts, or is even inconsistent with, the facts as stated in Mr. Hester's affidavit. Even under the government's theory of federal funds pre-emption, therefore, this record requires pre-emption of respondent's claim with respect to lack of gates at Cook Street.

D. Respondent's Claim Is Pre-empted Under *Marshall*.

Respondent argues that pre-emption is inappropriate under the test set forth in *Marshall* v. *Burlington Northern, Inc.*, 720 F.2d 1149, 1154 (9th Cir. 1983). Although respondent concedes that public authorities evaluated the crossing, she argues that "there has never been a federal decision that the warning device at Cook Street was adequate." Resp. Br. 33.[17]

---

[17] In making this argument, respondent mischaracterizes the deposition testimony of her expert, Mr. Burnham. To begin with, respondent neglects to mention that the district court excluded this testimony from the record on summary judgment because it was not timely presented. Pet. App. 24a. Respondent nevertheless relies on this testimony to assert that due to "difficulties from the railroad side, the project was not moving," and that "the Georgia DOT, afraid of losing money which had been earmarked for this project, transferred the funds to an active one." Resp. Br. 33. In fact, Mr. Burnham twice stated that while he initially thought that there had been delay on the railroad's part, he "subsequently learned that the railroad determined that they would be able to change the transmission line and they subsequently did and then we continued on with the project." J.A. 33; *see id.* at 31 ("what I found out was that the railroad did continue to cooperate in relocating the transmission line").

Mr. Burnham's testimony simply reinforces that of Mr. Hester, whose affidavit was properly in evidence, by showing that the State, pursuant to its federally mandated grade crossings program, evaluated the Cook Street crossing and made a decision not to install gate arms. Mr. Burnham confirms that the construction of traffic islands was "not compatible with the City of Cartersville." J.A. 32. Thus, Burnham and Hester agree that the decision whether or not to add gate arms at Cook Street was made by the public authority with jurisdiction.

Respondent's argument misses the point of *Marshall*, which was to preserve the railroad's state law duty to ensure the presence of adequate warning devices until the state had acted pursuant to federally delegated authority. The court found no pre-emption because "[t]he locality in charge of the crossing in question ha[d] made no determination under the manual regarding the type of warning device to be installed at the crossing." 720 F.2d at 1154.[18] Here, it is undisputed that the public authority did make such a determination. The GDOT, pursuant to its "State and Federal funded Grade Crossing Safety Program" (J.A. 15-16 ¶ 3), had a diagnostic and engineering team evaluate each of the crossings in Cartersville, Georgia, including Cook Street. The GDOT initially recommended that gate arms be installed, the City objected to that design, and the State ultimately decided not to order the installation of gate arms. See J.A. 15-17, 29-33; see also *supra* at 21 n.17.

These undisputed facts establish pre-emption under the unduly narrow test of *Marshall*. See CSXT Br. 38-39. Whether the public authorities made the "correct" decision is immaterial to pre-emption of the claim against CSXT, although it may be relevant to a tort claim against the State. The dispositive point is that "a federal decision [was] reached through the local agency on the adequacy of the warning devices at the crossing." *Marshall*, 720 F.2d at 1154. By taking responsibility for evaluating and deciding whether or not to add gate arms to the Cook Street crossing, the local agency exercised its federally delegated authority and thereby triggered pre-emption of any state law duty imposed on railroads to make that same determination.

---

[18] Accordingly, *Marshall* should not be read as limiting pre-emption to circumstances where a state has affirmatively stated that crossing devices are "adequate." Such statements are not required by federal law, and evidence of them would not be admissible under 23 U.S.C. § 409. *See* CSXT Br. 38-39.

IV. RESPONDENT'S TRAIN SPEED CLAIM IS ALSO PRE-EMPTED.

Respondent's argument against pre-emption of her train speed claim is premised on the theory that "[a] federal regulation addresses the 'same subject matter' of a state requirement *only* if both regulations address the same safety concerns." Resp. Br. 41 (citation omitted). Respondent's premise is false. This Court has repeatedly held that pre-emption "turns not on whether federal and state laws 'are aimed at distinct and different evils' " but on whether they " 'operate upon the same object.' " CSXT Br. 45 (quoting *Gade* v. *National Solid Wastes Management Ass'n*, 112 S. Ct. 2374, 2387 (1992)); see also *Perez* v. *Campbell*, 402 U.S. 637, 651-52 (1971). This basic principle has particular force where, as here, Congress has expressly ordered pre-emption when the Secretary has adopted a regulation "covering the subject matter" of the state requirement. 45 U.S.C. § 434. Respondent cannot escape the fact that the subject matter of the Secretary's regulations and the state law duty are the same—the speed at which trains may travel.

Even if respondent were correct that the Secretary's safety regulations and standards must address the same safety concerns as the state law, the Secretary plainly has done so with respect to the state's concerns here. The Secretary requires that active control devices be designed to provide motorists with at least 20 seconds of advance warning regardless of the speed of the advancing train. CSXT Br. 45-46 (quoting MUTCD 8C-7); see also MUTCD Handbook at 8-53. As for passive control devices, the Secretary requires that they be placed to take into account the "given speed" of the train. MUTCD Handbook 8-69; see *id.* at 8-69 at 8-74. If the physical characteristics of the crossing preclude the signs from being posted to give the motorist adequate warning to avoid a collision with a train traveling at that speed, then "consideration should be given to the installation of active crossing devices." *Id.* at 8-74; see also CSXT Br. 46 (hazard assessment pursuant to 23 C.F.R. § 924.9 takes

into account train speed); MUTCD Handbook at 8-59 (diagnostic team must consider, *inter alia*, "train and vehicle speed"). In sum, the Secretary has addressed the risk that train speed poses at grade crossings by promulgating maximum operating speeds that the Secretary has found to be safe, and by designing traffic control devices to provide motorists with adequate warning of trains given those speeds.

V. SECTION 434'S EXCEPTION FOR ESSENTIALLY LOCAL SAFETY HAZARDS DOES NOT APPLY TO THE CLAIMS IN THIS CASE.

Finally, respondent argues that because state tort law "requires different things at different times of day" and at different crossings, it addresses essentially local safety hazards and is not pre-empted. Resp. Br. 48-50.[19] Respondent would have the local hazard exception in Section 434 swallow the rule that reference to the word "law" in an express pre-emption provision includes tort law. See CSXT Br. 23-27. Under respondent's view, every crossing would present a local safety hazard.

That is not what Congress enacted. The House Report explains that Congress had "no intent to permit a State to establish Statewide standards superimposed on national standards covering the same subject matter."[20] Yet respondent concedes that the state tort duties here—which

[19] The court of appeals rejected this argument. Pet. App. 6a-7a n.3. The Solicitor General agrees that the local hazard exception is inapplicable here. S.G. Br. 15 n.11.

[20] H.R. Rep. No. 1194, 91st Cong., 2d Sess., *reprinted in* 1970 U.S.C.C.A.N. 4104, 4117 ("House Report"). At the hearings, advocates of this exception explained that it would apply only to uniquely local hazards, such as that posed by the "horseshoe curve" in the track at Altoona, Pa., a stretch of track so unusual that it was designated a national landmark. 1970 Hearings at 75, 85 (testimony of G. Bloom, T. Goodfellow). *See also id.* at 36 (statement of Secretary Volpe); *id.* at 114 (statement of Mr. Moloney); 116 Cong. Rec. 27612 (statement of Rep. Springer); *Armijo* v. *Atchison, T. & S. F. Ry.*, 754 F. Supp. 1526, 1532-33 (D.N.M. 1990), *appeal docketed*, Nos. 91-2084, 91-2088 (10th Cir. 1991).

are imposed by state statute[21]—are "statewide" standards. Resp. Br. 49. Similarly, the House Report states that "[t]he purpose of this . . . provision is to enable the States to respond to local situations not capable of being adequately encompassed within uniform national standards."[22] Yet the Secretary can and has set forth national standards that address the concerns that respondent claims state tort law would address. Compare Resp. Br. 49 (state law considers "time of day, the weather conditions, the frequency of vehicle or truck traffic across different grade crossings, and the adequacy of the protection") with MUTCD 8A-1 to 8A-2, 8B-5 (requiring reflectorized signs at all crossings to improve visibility at all times of day, and illumination where additional visibility is needed) and 23 C.F.R. § 924.9(a)(4)(iii), (v) (requiring states to consider existing warnings and density of traffic over the crossing in evaluating need for new signals). At bottom, a blanket exception for state tort law relating to rail safety at grade crossings is irreconcilable with Congress's decisions to pre-empt "any law" that relates to a subject matter covered by the Secretary's regulations (45 U.S.C. § 434) and to create a nationally guided Rail-Highway Crossings Program (23 U.S.C. § 130(d)) to address those risks at every public grade crossing.

CONCLUSION

For these reasons and those stated in CSXT's opening brief, the judgment in No. 91-790 should be reversed and the judgment in No. 91-1206 should be affirmed.

[21] *See* Ga. Code Ann. § 51-1-2 (1991) (defining duty to use ordinary care); *see also id.* § 46-8-190 (railroad must "exercise due care in approaching the crossing").

[22] House Report at 4117.

Respectfully submitted,

JACK H. SENTERFITT *
RICHARD T. FULTON
JAMES W. HAGAN
ALSTON & BIRD
1201 West Peachtree
Atlanta, Georgia 30309-3424
(404) 881-7000

HOWARD J. TRIENENS
CARTER G. PHILLIPS
MARK E. HADDAD
LAURA V. FARTHING
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000

Counsel for Petitioner in No. 91-790
Counsel for Cross-Respondent in No. 91-1206

November 16, 1992

* Counsel of Record